

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEMOCRACY FORWARD
FOUNDATION
1333 H Street, NW
Washington, D.C. 20005

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
STATE,
2201 C Street, NW
Washington, D.C. 20520

UNITED STATES DEPARTMENT OF
THE TREASURY,
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY,
3801 Nebraska Avenue, NW
Washington, D.C. 20016

and

UNITED STATES SMALL BUSINESS
ADMINISTRATION,
409 3rd Street, SW
Washington, D.C. 20416

Defendants.

Case No.

COMPLAINT FOR INJUNCTIVE RELIEF

1. Plaintiff Democracy Forward Foundation (“Democracy Forward”) brings this action against Defendants United States Department of State (“State”), United States Department of the Treasury (“Treasury”), United States Department of Homeland Security (“DHS”), and

United States Small Business Administration (“SBA”), to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

2. In November 2018, *The Daily Beast* reported, based on documents produced in response to a FOIA request, that Environmental Protection Agency officials expressly approved a script bolstering the Trump Administration’s policy agenda, which script was read by a news anchor in advance of then-Administrator Scott Pruitt’s May 2017 appearance on *Fox & Friends*, the morning program of Fox News Channel, without acknowledging the government’s role in creating the content.¹

3. These actions raised concerns about possible violations of a law that prohibits the government from playing an undisclosed role in the creation and dissemination of information and opinions through the news media. *See* Ex. A, Letter from Democracy Forward & Restore Public Trust to Charles J. Sheehan, Acting Inspector General, Environmental Protection Agency (Dec. 13, 2018) (letter requesting investigation into unlawful covert propaganda).

4. In order to determine how widespread these potentially unlawful practices are, Plaintiff submitted FOIA requests to Defendants seeking records reflecting communications between agency press offices and the following media outlets: Fox News Channel, Breitbart News, CRTV.com, The Blaze, NewsMax, Daily Caller, Daily Wire, One America News, and Sinclair Broadcast Group.

5. Defendant Treasury has unlawfully denied Plaintiff’s request, and Defendants State, Treasury, DHS, and SBA have failed to respond sufficiently to Plaintiff’s requests.

¹ See Maxwell Tani, ‘Fox & Friends’ Fed Interview Script to Trump’s EPA Chief, Emails Show, Daily Beast, Nov. 27, 2018 <https://www.thedailybeast.com/fox-and-friends-fed-interview-script-to-trumps-epa-chief-emails-show>.

Plaintiff therefore respectfully requests that the Court compel Defendants to comply with FOIA and produce all responsive, non-exempt records.

Jurisdiction and Venue

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

7. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

8. Because Defendants have failed to comply with the applicable time limit provisions of FOIA, Plaintiff is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

Parties

9. Plaintiff Democracy Forward Foundation is a not-for-profit organization incorporated under the laws of the District of Columbia and based in Washington, D.C. Plaintiff works to promote transparency and accountability in government, in part, by educating the public on government actions and policies.

10. Defendant State is a federal agency within the meaning of FOIA (*see* 5 U.S.C. § 552(f)(1)), headquartered in Washington, D.C., and has possession, custody, and control of records Plaintiff seeks.

11. Defendant Treasury is a federal agency within the meaning of FOIA (*see* 5 U.S.C. § 552(f)(1)), headquartered in Washington, D.C., and has possession, custody, and control of records Plaintiff seeks.

12. Defendant DHS is a federal agency within the meaning of FOIA (*see* 5 U.S.C. § 552(f)(1)), headquartered in Washington, D.C., and has possession, custody, and control of records Plaintiff seeks.

13. Defendant SBA is a federal agency within the meaning of FOIA (*see* 5 U.S.C. § 552(f)(1)), headquartered in Washington, D.C., and has possession, custody, and control of records Plaintiff seeks.

FACTUAL ALLEGATIONS

State FOIA Request

14. Plaintiff submitted a FOIA request to State via facsimile on December 13, 2018, requesting the following records:

(1) All records containing or documenting communications sent to or received by all staff, including officers, employees, and contractors, in State’s Bureau of Public Affairs with the following organizations and domains:

- Fox News or @foxnews.com
- Breitbart News Network or @breitbart.com
- CRTV.com or @crtv.com
- The Blaze or @theblaze.com
- NewsMax or @newsmaxtv.com
- Daily Caller or @dailycaller.com
- Daily Wire or @dailywire.com
- One America News or @oann.com
- Sinclair Broadcast Group or @sgbi.net

Ex. B (“State FOIA Request”) at 2.

15. The request was limited to records created from January 20, 2017, to the date on which the search was completed.

16. Democracy Forward sought a waiver of search and duplicating fees for the FOIA request under 5 U.S.C. § 552(a)(4)(A)(iii) and 22 C.F.R. § 171.16, which require waiver of fees if the disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See* State FOIA Request at 3.

17. State sent no acknowledgement in response to Democracy Forward’s FOIA request.

18. State's response to Democracy Forward's FOIA request was due on January 14, 2019. *See* 5 U.S.C. § 552(a)(6)(A)(i).

19. Between February 19, 2019, and February 21, 2019, a Democracy Forward employee called State's FOIA Requester Service Center seeking an update on the status of the State FOIA Request, and left at least one voice message. The Democracy Forward employee never reached a State representative or received any response.

20. As of the date of this Complaint, State has not informed Plaintiff whether it will comply with the FOIA Request. Nor has State notified Plaintiff of the scope of any responsive records State intends to produce or withhold, and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific, adverse determination.

21. Because State has "fail[ed] to comply with the applicable time limit provisions" of the FOIA, Plaintiff is "deemed to have exhausted [its] administrative remedies." *See id.* § 552(a)(6)(C)(i).

Treasury FOIA Request

22. Plaintiff submitted a FOIA request to Treasury on December 13, 2018, requesting the following records:

- (1) All records containing or documenting communications sent to or received by all staff, including officers, employees, and contractors, in Treasury's Office of Public Affairs (OPA) with the following organizations and domains:
 - Fox News or @foxnews.com
 - Breitbart News Network or @breitbart.com
 - CRTV.com or @crtv.com
 - The Blaze or @theblaze.com
 - NewsMax or @newsmaxtv.com
 - Daily Caller or @dailycaller.com
 - Daily Wire or @dailywire.com
 - One America News or @oann.com
 - Sinclair Broadcast Group or @sgbi.net

Ex. C (“Treasury FOIA Request”) at 2.

23. The request was limited to records created from January 20, 2017, to the date on which the search was completed.

24. Democracy Forward sought a waiver of search and duplicating fees for the FOIA request under 5 U.S.C. § 552(a)(4)(A)(iii) and 31 C.F.R. § 1.7 which require waiver of fees if the disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See also* Treasury FOIA Request at 3.

25. On December 17, 2018, Treasury acknowledged Democracy Forward’s FOIA Request, assigning it tracking number 2018-12-063. Treasury’s response claimed that the request did not describe the records sought “in reasonably sufficient detail,” and required that Democracy Forward amend its request to identify “the specific Treasury record by subject matter and [...] specific Treasury Office of Public Affairs official(s),” or else the request would be administratively closed. *See* Exhibit D at 1, 2.

26. In a response sent to Treasury on December 17, 2018, Democracy Forward declined to amend its request, stating that the request is narrow, specific, and satisfies all legal requirements, and further noting that Treasury’s apparent determination that it “is unable to identify the staff who have worked in its own Office of Public Affairs since January 20, 2017” is puzzling. *See* Exhibit E at 1.

27. Treasury did not respond to Democracy Forward’s December 17, 2018 letter in any way, nor has Treasury corresponded with Democracy Forward regarding the FOIA request since that date. Treasury has not notified Democracy Forward that it has any right to appeal Treasury’s adverse determination.

28. Treasury's response to Democracy Forward's FOIA request was due January 14, 2019. *See* 5 U.S.C. § 552(a)(6)(A)(i).

29. As of the date of this Complaint, apart from indicating that it would administratively close the FOIA request, Treasury has not informed Plaintiff whether it will comply with the FOIA Request. Nor has Treasury notified Plaintiff of the scope of any responsive records Defendant intends to produce or withhold, and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific, adverse determination.

30. Because Treasury has "fail[ed] to comply with the applicable time limit provisions" of the FOIA, even with the benefit of any extensions of time that Defendant might have claimed, Plaintiff is "deemed to have exhausted [its] administrative remedies." *See id.* § 552(a)(6)(C)(i).

DHS FOIA Request

31. Plaintiff submitted a FOIA request to DHS on December 13, 2018, requesting the following records:

- (1) All records containing or documenting communications sent to or received by all staff, including officers, employees, and contractors, in DHS's Office of Public Affairs (OPA) with the following organizations and domains:
 - Fox News or @foxnews.com
 - Breitbart News Network or @breitbart.com
 - CRTV.com or @crtv.com
 - The Blaze or @theblaze.com
 - NewsMax or @newsmaxtv.com
 - Daily Caller or @dailycaller.com
 - Daily Wire or @dailywire.com
 - One America News or @oann.com
 - Sinclair Broadcast Group or @sgbi.net

Ex. F ("DHS FOIA Request") at 2.

32. The request was limited to records created from January 20, 2017, to the date on which the search was completed.

33. Democracy Forward sought a waiver of search and duplicating fees for the FOIA request under 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11 which require waiver of fees if the disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See also* DHS FOIA Request at 3.

34. DHS sent Democracy Forward a letter on December 17, 2018 acknowledging receipt of the request; assigning tracking number 2019-HQFO-00229; conditionally granting a fee waiver request; and invoking a 10-day extension for the request, pursuant to 6 C.F.R. § 5.5(c). *See* Ex. G.

35. DHS’s response to Democracy Forward’s request was due by January 29, 2019. *See* 5 U.S.C. § 552(a)(6)(A)(i); 6 C.F.R. § 5.5(c).

36. As of the date of this Complaint, DHS has not informed Plaintiff whether it will comply with the FOIA Request. Nor has DHS notified Plaintiff of the scope of any responsive records Defendant intends to produce or withhold, and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific, adverse determination.

37. Because DHS has “fail[ed] to comply with the applicable time limit provisions” of the FOIA, even with the benefit of the extension of time that DHS claimed, Plaintiff is “deemed to have exhausted [its] administrative remedies.” *See id.* § 552(a)(6)(C)(i).

SBA FOIA Request

38. Plaintiff submitted a FOIA request to SBA on December 13, 2018, requesting the following records:

(1) All records containing or documenting communications sent to or received by all staff, including officers, employees, and contractors, in SBA’s Office of Communications & Public Liaison with the following organizations and domains:

- Fox News or @foxnews.com
- Breitbart News Network or @breitbart.com
- CRTV.com or @crtv.com
- The Blaze or @theblaze.com
- NewsMax or @newsmaxtv.com
- Daily Caller or @dailycaller.com
- Daily Wire or @dailywire.com
- One America News or @oann.com
- Sinclair Broadcast Group or @sgbi.net

See Ex. H (“SBA FOIA Request”) at 2.

39. The request was limited to records created from January 20, 2017, to the date on which the search was completed.

40. Democracy Forward sought a waiver of search and duplicating fees for the FOIA request under 5 U.S.C. § 552(a)(4)(A)(iii) and 13 C.F.R § 102.8(l) which require waiver of fees if the disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See also* SBA FOIA Request at 3.

41. Democracy Forward received an email on December 13, 2018, confirming submission of the Request and assigning it tracking number SBA-2019-000213. *See Ex. I at 1.*

42. SBA’s response to Democracy Forward’s FOIA request was due January 14, 2019. *See 5 U.S.C. § 552(a)(6)(A)(i).*

43. As of the date of this Complaint, SBA has not informed Plaintiff whether it will comply with the FOIA Request. Nor has SBA notified Plaintiff of the scope of any responsive records Defendant intends to produce or withhold, and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific, adverse determination.

44. Because SBA has “fail[ed] to comply with the applicable time limit provisions” of the FOIA, even with the benefit of any extensions of time that Defendant might have claimed, Plaintiff is “deemed to have exhausted [its] administrative remedies.” *See id.* § 552(a)(6)(C)(i).

CLAIMS FOR RELIEF

Count One (Violation of the FOIA by State), 5 U.S.C. § 552

45. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

46. By failing to respond to Plaintiff’s request within the statutorily prescribed time limit, State has violated its duties under FOIA, *see* 5 U.S.C. § 552 *et seq.*, including but not limited to its duties to conduct a reasonable search for responsive records and to produce all responsive, reasonably segregable, non-exempt information, and to not withhold responsive records.

47. Plaintiff is being irreparably harmed by State’s violation of the FOIA and will continue to be irreparably harmed until State is compelled to comply with the FOIA.

Count Two (Violation of the FOIA by Treasury), 5 U.S.C. § 552

48. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

49. Treasury’s December 17, 2018 letter constitutes unlawful denial or constructive denial of the Treasury FOIA Request. Pursuant to that letter, and over Democracy Forward’s objection, Treasury has administratively closed the Treasury FOIA Request and therefore is not fulfilling its obligations pursuant to FOIA to process the request and produce responsive records.

50. Democracy Forward has constructively exhausted administrative appeals of Treasury's denial because Treasury has concluded that Democracy Forward has no right to administratively appeal its denial, and thus any appeal would be futile.

51. By failing in all other respects to respond to Plaintiff's request within the statutorily prescribed time limit, Treasury has violated its duties under FOIA, *see 5 U.S.C. § 552 et seq.*, including but not limited to its duties to conduct a reasonable search for responsive records and to produce all responsive, reasonably segregable, non-exempt information, and to not withhold responsive records.

52. Plaintiff is being irreparably harmed by Treasury's violation of the FOIA and will continue to be irreparably harmed until Treasury is compelled to comply with the FOIA.

Count Three (Violation of the FOIA by DHS), 5 U.S.C. § 552

53. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

54. By failing to respond to Plaintiff's request within the statutorily prescribed time limit, DHS has violated its duties under FOIA, *see 5 U.S.C. § 552 et seq.*, including but not limited to its duties to conduct a reasonable search for responsive records and to produce all responsive, reasonably segregable, non-exempt information, and to not withhold responsive records.

55. Plaintiff is being irreparably harmed by DHS's violation of the FOIA and will continue to be irreparably harmed until DHS is compelled to comply with the FOIA.

Count Four (Violation of the FOIA by SBA), 5 U.S.C. § 552

56. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

57. By failing to respond to Plaintiff's request within the statutorily prescribed time limit, SBA has violated its duties under FOIA, *see* 5 U.S.C. § 552 *et seq.*, including but not limited to its duties to conduct a reasonable search for responsive records and to produce all responsive, reasonably segregable, non-exempt information, and to not withhold responsive records.

58. Plaintiff is being irreparably harmed by SBA's violation of the FOIA and will continue to be irreparably harmed until SBA is compelled to comply with the FOIA.

Request for Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

1. order Defendants to conduct a search for any and all records responsive to Plaintiff's FOIA request using search methods reasonably likely to lead to discovery of all responsive records;
2. order Defendants to produce, by a date certain, any and all non-exempt responsive records and a *Vaughn* index of any responsive records withheld under a claim of exemption;
3. enjoin Defendants from continuing to withhold any and all non-exempt responsive records;
4. order Defendants to grant Plaintiff's requests for a fee waiver;
5. award Plaintiff its attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
6. grant Plaintiff such other relief as this Court deems just and proper.

Dated: February 25, 2019

Respectfully submitted,

/s/ Nitin Shah

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